

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

BORDEAUX V. REGIONAL WEST MED. CTR.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

DOLORES BORDEAUX, APPELLANT,  
V.  
REGIONAL WEST MEDICAL CENTER, APPELLEE.

Filed May 18, 2010. No. A-09-1209.

Appeal from the Workers' Compensation Court. Affirmed.

Harry R. Meister for appellant.

Patrick J. Sodoro, of Sodoro, Daly & Sodoro, P.C., for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

**INTRODUCTION**

Dolores Bordeaux appeals from the orders of the Nebraska Workers' Compensation Court review panel affirming the decision of the trial court and overruling her motion to modify the order of affirmance on review. For the reasons set forth below, we affirm the judgment of the review panel. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

**STATEMENT OF FACTS**

Bordeaux filed a petition in September 2007, alleging that she had been injured in the scope of her employment with Regional West Medical Center (Medical Center). Bordeaux, born in December 1939, has been employed with the Medical Center since 1969 as a licensed practical nurse, initially working as a floor nurse at the hospital. For the 15 years prior to her accident, she had worked as a visiting nurse, traveling to and from various patients' homes on a daily basis to provide care and treatment. In February 2005, Bordeaux was traveling from one home to the next when she made a stop at a bank to obtain cash for her lunch. Bordeaux was

injured when the vehicle she was driving was rear-ended by another vehicle. Bordeaux retired in April 2005.

A major issue at trial was whether Bordeaux was injured while in the scope of her employment with the Medical Center. This issue was resolved in favor of Bordeaux and is not before this court. Instead, the sole issue on appeal involves the assessment of Bordeaux's loss of earning capacity. Entered into evidence at trial was the report of the court-appointed vocational rehabilitation counselor, Patricia Conway, that Bordeaux had sustained a 55-percent loss of earning capacity. Although Conway's report accurately recounts Bordeaux's work history as a floor nurse followed by 15 years as a home health nurse, Conway subsequently stated that Bordeaux is now "prohibited from returning [to] the floor nursing work she performed pre-injury." In her conclusion, Conway's assessment of a 55-percent loss of earning capacity was based on "the fact that . . . Bordeaux is unable to continue to work as a floor nurse" and that she "will experience a loss of wage due to her inability to return to her pre-injury job as a floor nurse."

The trial court concluded that Conway's opinion was flawed, observing that her opinion was premised largely upon the impaired capacity of Bordeaux to return to work as a floor nurse, an occupation that Bordeaux had testified was much more strenuous and demanding than that of a home health nurse. Having rejected the presumption of correctness, the trial court made the determination that Bordeaux's loss of earning capacity was 25 percent, relying on her testimony along with a consideration of her educational background, her work history, and her injury and the resulting restrictions, as well as Conway's analysis. The trial judge also noted that there were competing opinions between the parties' medical experts, one of whom found some deficits while another found none.

Following the trial court's decision, the Medical Center timely filed an application for review. Bordeaux apparently cross-appealed on the issue of her loss of earning capacity, although her cross-appeal is not in our record. On November 5, 2009, the review panel affirmed the trial court's decision, noting that the trial court's findings with regard to whether Bordeaux's injuries were sustained in the course of her employment were questions of fact which were not clearly wrong. The order of affirmance is silent with regard to Bordeaux's cross-appeal.

On November 13, 2009, Bordeaux filed a motion to modify the order of affirmance on review pursuant to Neb. Rev. Stat. § 48-180 (Reissue 2004). Bordeaux's motion asserted that the "Court failed to consider or make any finding on the Plaintiff's Cross-Appeal that the trial judge erred in failing to accept the rebuttable presumption of correctness of the Court-appointed Vocational Rehabilitation specialist opinion as to the Plaintiff's loss of earning power." Bordeaux's motion was denied on November 16. The review panel stated that silence regarding a request for relief not addressed is considered a denial when it is apparent that the court intended its order to be a final determination of the rights and liabilities of the parties. The review panel also stated that there was evidence in the record to support the findings of the trial judge that the opinion of the vocational counselor was flawed and to make a determination of earning capacity. Bordeaux appealed to this court on December 4.

## ASSIGNMENTS OF ERROR

Bordeaux contends, as restated, that the trial court erred in finding that the vocational counselor's opinion was flawed and in determining that her loss of earning capacity was 25 percent.

## STANDARD OF REVIEW

Under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Obermiller v. Peak Interest*, 277 Neb. 656, 764 N.W.2d 410 (2009).

On appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Murphy v. City of Grand Island*, 274 Neb. 670, 742 N.W.2d 506 (2007). If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

## ANALYSIS

Bordeaux asserts that the trial judge erred in concluding that the opinion of the court-appointed rehabilitation counselor as to Bordeaux's loss of earning capacity was rebutted. Under Neb. Rev. Stat. § 48-162.01(3) (Cum. Supp. 2006), a loss of earning power evaluation performed by a vocational rehabilitation counselor selected by the parties is entitled to a rebuttable presumption of correctness. *Frauendorfer, supra*. A rebuttable presumption is generally defined as a presumption that can be overturned upon the showing of sufficient proof. *Id.* In all cases not otherwise provided for by statute or by the Nebraska Evidence Rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. This rule applies to the rebuttable presumption that an opinion regarding loss of earning capacity expressed by a vocational rehabilitation counselor appointed or selected pursuant to § 48-162.01(3) is correct. *Frauendorfer, supra*. In determining whether the presumption contained in § 48-162.01(3) has been rebutted, the single judge is required to make factual findings. *Frauendorfer, supra*. That is precisely what the trial judge did in this case.

In rejecting Conway's opinion, the trial judge found that it was flawed in its references to Bordeaux's work as a floor nurse. The court stated that it was concerned that Conway gave little or no consideration to the job actually being performed by Bordeaux at the time of her injury.

In making its determination of loss of earning capacity, the trial judge stated that he considered Bordeaux's educational background, her work history, and her injury and the resulting restrictions, as well as Conway's analysis. The trial judge stated that he was applying the factors set forth in *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980). Such an evaluation was clearly within the authority of the trial judge, because we have made it clear

that loss of earning power is a question of fact measured by a myriad of factors. *Romero v. IBP, inc.*, 9 Neb. App. 927, 623 N.W.2d 332 (2001) (citing *Sidel, supra*).

The single judge of the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003). A determination of whether there was sufficient competent evidence to rebut Conway's opinion was a question of fact for the court to consider. Given the record before us, we cannot conclude that the trial judge was clearly wrong in rejecting the presumption of correctness with regard to Conway's opinion and in concluding that Bordeaux had suffered a 25-percent loss of earning capacity.

#### CONCLUSION

After reviewing the record, we conclude that the trial court did not err in rejecting the opinion of the vocational counselor and in determining that Bordeaux had suffered a loss in earning capacity of 25 percent. The judgment of the Workers' Compensation Court review panel is affirmed.

AFFIRMED.